BORDEN, J., dissenting. The majority's opinion rests on two premises, namely, that (1) our scope of review is limited to whether the trial court abused its discretion in denying the motion to open and set aside the stipulated judgment in question and (2) in light of that limited scope of review, there was sufficient evidence in the record to support the trial court's determination that Thomas Sansone, the attorney for the plaintiff, Yale University, had apparent authority to enter into that judgment. I disagree with both premises. I therefore dissent.

I begin with the scope of our review. As the majority opinion acknowledges, the plaintiff has expressly disavowed any challenge to the facts found by the trial court. Although the question of agency is a question of fact when the evidence is conflicting or is susceptible of more than one reasonable inference; *Maharishi School of Vedic Sciences, Inc.* (*Connecticut*) v. *Connecticut Constitution Associates Ltd. Partnership*, 260 Conn. 598, 606, 799 A.2d 1027 (2002); agency becomes a question of law when, as in the present case, the facts are undisputed. *Russo* v. *McAviney*, 96 Conn. 21, 24, 112 A. 657 (1921). Furthermore, it is a question of law when, as I will discuss, no reasonable fact finder could find agency in the circumstances of this particular case. *Hallas* v. *Boehmke & Dobosz, Inc.*, 239 Conn. 658, 674, 686 A.2d 491 (1997). Although, as the majority notes, ordinarily the scope of appellate review of a trial court's ruling on a motion to open a judgment is abuse of discretion, that scope of review does not apply when, as in the present case, the decision on that motion depends entirely on the purely legal question of whether, under the undisputed facts of the case, Sansone had apparent authority to stipulate to the judgment in question. Put another way, a trial court cannot have discretion to deny a motion that depends entirely on a question of law. See *Water Pollution Control Authority* v. *OTP Realty, LLC*, 76 Conn. App. 711, 713–14, 822 A.2d 257 (plenary review applies when purely legal question concerning standing was presented in motion to open), cert. denied, 264 Conn. 920, 828 A.2d 619 (2003). Thus, contrary to the approach of the majority, the trial court's conclusion that Sansone had apparent authority is not entitled to deference on appeal. We review that conclusion de novo.

I turn next, therefore, to the question of whether, on the undisputed facts of the present case, Sansone had apparent authority to bind the plaintiff to this stipulated judgment. I would conclude that he did not.

The law of apparent authority is well settled, particularly as it applies, as in the present case, to the apparent authority of an attorney to bind his client by way of

stipulating to a judgment. "Apparent authority must be derived not from the acts of the agent but from the acts of his principal. [T]he acts of the principal must be such that (1) the principal held the agent out as possessing sufficient authority to embrace the act in question, or knowingly permitted him to act as having such authority, and (2) in consequence thereof the person dealing with the agent, acting in good faith, reasonably believed, under all the circumstances, that the agent had the necessary authority."[1] (Internal quotation marks omitted.) *Hallas* v. *Boehmke & Dobosz, Inc.*, supra, 239 Conn. 674. It "*must appear from the principal's conduct that the principal held the agent out* as possessing sufficient authority to embrace the act in question, or knowingly permitted [the agent] to act as having such authority." (Emphasis added.) *Gordon* v. *Tobias*, 262 Conn. 844, 851, 817 A.2d 683 (2003). Thus, only a principal with actual authority can clothe an agent with apparent authority, and that clothing must appear from his conduct or his knowing permission of the agent's acting as if he had such authority.

Furthermore, it is unquestioned that the authority to settle a claim rests with the client, not the attorney. *Rodriguez* v. *State*, 76 Conn. App. 614, 623–24, 820 A.2d 1097 (2003). "An attorney who is authorized to represent a client in litigation does not automatically have either implied or apparent authority to settle or otherwise to compromise the client's cause of action." *Acheson* v. *White*, 195 Conn. 211, 213 n.4, 487 A.2d 197 (1985). The authority of an attorney to negotiate on behalf of a client does not imply actual authority or clothe him with apparent authority to settle a matter. See *Norwalk* v. *Board of Labor Relations*, 206 Conn. 449, 453, 538 A.2d 694 (1988) (counsel with authority to negotiate on behalf of client "was without authority to bind [client] to a settlement"); see also *Johnson* v. *Schmitz*, 237 F. Sup. 2d 183, 192 (D. Conn. 2002) (counsel's authority to engage in negotiations is "distinct and materially different [from his] authority to execute or agree to a specific settlement"). Application of these principles leads to the conclusion that Sansone had no apparent authority to enter into the stipulated judgment on behalf of the plaintiff.

First, it is worthy of note that, as the plaintiff explains, this judgment had at least one significant adverse effect on the plaintiff's claim to ownership of the property in question, which is located in downtown New Haven. Under the terms of the stipulation, despite the fact that the defendant, Out of the Box, LLC, did not concede the plaintiff's right to ownership or possession of the parcel in question, and despite the fact that the defendant retained the right to bring claims of adverse possession, prescriptive easement or related claims, thus creating clouds on the title, only the defendant, and not the plaintiff, could bring a quiet title action. Thus, if someone approached the plaintiff to buy the property,

the plaintiff would be at the defendant's mercy insofar as clearing the title of the clouds created by the defendant's claims is concerned.

Second, the question of whether Sansone had apparent authority to enter into this stipulation has been clarified by three appropriately candid concessions of the plaintiff at oral argument in this court. The defendant candidly acknowledged that (1) neither David Newton, the plaintiff's director of university properties, nor Sansone had actual authority to settle the case, (2) only Bruce Alexander, the plaintiff's vice president for New Haven and state affairs and campus development, had actual authority to settle the case and (3) therefore, to prevail, the defendant must have established that Alexander clothed Sansone with apparent authority. This is clear, moreover, from the bylaws of the plaintiff, introduced into evidence, and from the undisputed fact that throughout the lengthy negotiations, all of the proposed leases and other documents showed Alexander's signature as acting on behalf of the plaintiff. Indeed, Suzette Franco-Camacho, one of the defendant's principals, testified specifically that Alexander never told her that Sansone had authority to settle, and that she was led to believe that he had such authority solely from the fact that he had been negotiating on the plaintiff's behalf and that he appeared in court.

The question, then, becomes quite simple: did Alexander do anything to clothe Sansone, the plaintiff's attorney, with apparent authority, or knowingly permit him to act as if he had actual authority, to settle this matter? The answer is clearly no. All that Alexander did was to permit Sansone to enter into a series of *negotiations* with the defendant and to send Sansone to court to *negotiate* in an effort to reach a settlement of the matter. Negotiation is precisely what attorneys are hired to do on behalf of a client, but it is the client that makes the decision on settlement. The authority of an attorney to negotiate on behalf of a client, which is unquestioned, does not and cannot clothe him with apparent authority to settle the case on the client's behalf. *Norwalk* v. *Board of Labor Relations*, supra, 206 Conn. 452; *Johnson* v. *Schmitz*, supra, 237 F. Sup. 2d 192.

The only evidence that the majority relies on for the assertion that Alexander clothed Sansone with apparent authority to settle is an unsolicited e-mail sent from Franco-Camacho to Alexander requesting his involvement in what *Franco-Camacho* characterized as "an issue that is . . . below your concern" and indicating her willingness to sign a license agreement. The majority cites Alexander's failure to respond as somehow supporting his having clothed Sansone with apparent authority. This simply cannot be.

Sansone is not mentioned at all in the e-mail, its date is not at all clear from the record, and Alexander had no duty of any kind to respond to this unsolicited e-mail.

I simply fail to see how his silence under these circumstances can rationally be taken as clothing Sansone with apparent authority to settle this dispute on behalf of his client without consulting with Alexander first.

The wise words of the United States Court of Appeals for the Second Circuit in a similar case bear repeating here. "We realize that the rule we announce here has the potential to burden, at least occasionally, [trial] courts which must deal with constantly burgeoning calendars. A contrary rule, however, would have even more deleterious consequences. Clients should not be faced with a Hobson's choice[2] of denying their counsel all authority to explore settlement or being bound by *any* settlement to which their counsel might agree, having resort only to an action against their counsel for malpractice." (Emphasis in original.) *Fennell* v. *TLB Kent Co.*, 865 F.2d 498, 503 (2d Cir. 1989).

Whether one views this case through the prism of a total lack of evidence to support a determination of apparent authority in Sansone or through the prism that no reasonable fact finder could find apparent authority, the conclusion is the same. Sansone had no apparent authority to bind his client to this settlement, and the client should not be bound by it.

I would, therefore, reverse the judgment and remand the case with direction to grant the motion to open and set aside.

[1] In the present case, it is clear to me that the plaintiff has not met the first part of this two part test, namely, whether the principal held out the agent as having sufficient authority or knowingly permitted him to act as having such authority. I therefore do not discuss the second part of the test. I note, however, that the plaintiff also claims that the second part of the test was not satisfied by the evidence in the case.

[2] I note that the use of the term "Hobson's choice" was inaccurate under the circumstances in *Fennell* v. *TLB Kent Co.*, 865 F.2d 498 (2d Cir. 1989). "That term does not signify a situation in which either alternative may be unfavorable; rather, it represents an illusory choice that is, in fact, no choice at all." *State* v. *Perkins*, 271 Conn. 218, 273 n.2, 856 A.2d 917 (2004) (*Katz*, *J.*, dissenting); see also *State* v. *Messler*, 19 Conn. App. 432, 436 n.3, 562 A.2d 1138 (1989) ("The term is derived from the practice of Thomas Hobson . . . an English liveryman, of requiring each customer to take the next available horse. Thus, in modern usage a Hobson's choice is '[a]n apparent freedom of choice with no real alternative.' American Heritage Dictionary of the English Language, New College Edition, [p.] 626."). Consequently, a Hobson's choice is not a choice between two nags; it is, instead, the "choice" to take the nag that is chosen for you. The course that the court in *Fennell* was deploring was a choice between two unfavorable alternatives, not an illusory choice that was, in fact, no choice at all.